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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973.

No. 73-424

ELIZABETH J. RUSSELL, INDIVIDUALLY AND AS REPRESENTATIVE OF ALL CAPITAL INVESTMENT SERVICE CUSTOMERS,
Petitioner,

vs.

CONTINENTAL ILLINOIS NATIONAL BANK & TRUST COMPANY OF CHICAGO, A CORPORATION,
Respondent.

REPLY BRIEF FOR PETITIONER.

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ARGUMENT.

The petitioner controverts points raised by the respondent's Brief in Opposition. For clarity of reference, the petitioner is called "Mrs. Russell," respondent is "the bank" and the bank's Capital Investment Service is "the fund".

I.

MRS. RUSSELL HAS STANDING TO INVOKE THE GLASS-STEAGALL ACT BY HER STATUS AS DEPOSITOR OF THE BANK.

The bank says it is not sufficient for Mrs. Russell to show economic injury from a violation of the Glass-Steagall Act; she must also display some "interest" which Congress intended to protect by that law. The bank apparently concedes that

Mrs. Russell sustained economic injury by the investment of $20,000.00, part of which was unquestionably lost by the fund's ill-fated venture into the Penn Central fiasco. The bank argues only that Mrs. Russell's participation in the entity which she claims is illegal removes her from the legions of the just which Congress sought to protect by the Glass-Steagall Act.

Both the bank and the appellate court below chose to ignore the fact that Mrs. Russell was an ordinary savings and checking account customer of the bank at all times material to this lawsuit. Mrs. Russell established this fact by her affidavit (Appendix below 106 and 110) as she had a perfect right to do in opposition to the bank's "speaking" motion to dismiss which went beyond the allegations of the complaint. The fact that Mrs. Russell is a bank depositor brings her squarely within the group of persons which the Glass-Steagall Act sought to protect. In 75 Cong. Rec. 9914 (1932) Senator Bulkley, a proponent of § 16, stated during Senate floor debates, ". . . the measure as a whole is in all of its fiber intended as a protection for depositors." Even the appellate court below (Petition A5) conceded " . . . we may assume also that the interest of depositors . . . may be sufficient to support" a suit similar to *Investment Company Institute* v. *Camp*, 401 U. S. 617 (1971).

In its arguments before the trial court and the appellate court below the bank presented affidavits and exhibits which went far beyond the allegations of the complaint in an attempt to show as a factual matter that its fund was not like the fund outlawed in *Investment Company Institute* v. *Camp*. Since the appellate court entertained these extraneous exhibits and arguments its refusal to consider Mrs. Russell's status as a depositor in determining the question of standing was unfair and erroneous. This is especially true because Mrs. Russell sues "individually" as well as a representative of other fund customers; it is Mrs. Russell's standing as an individual which is the issue here, not her qualifications to represent other members of a class.

II.

MRS. RUSSELL HAS STANDING TO INVOKE THE GLASS-STEAGALL ACT AS CUSTOMER OF THE BANK'S FUND BECAUSE SHE HAS SUFFERED ECONOMIC INJURY BY THE BANK'S VIOLATION OF THAT ACT.

Even if Mrs. Russell's status as a depositor is disregarded, the bank's promulgation of the "zone of interest to be protected or regulated" test is not necessarily a correct statement of the current law. In any case it is in no wise binding on this Court.

Mrs. Russell's complaint alleges that she deposited $20,000.00 in the bank's fund. This is not disputed; nor is it disputed that Mrs. Russell's $20,000.00 was never refunded her. Moreover, the bank strenuously argues—for other purposes, to be sure—that Mrs. Russell has suffered diminuition in her deposit in an amount of at least $5,400.00. The bank does not and cannot deny that this constitutes "injury in fact" for the purposes of standing.

If such "injury in fact" does not confer standing to challenge violation of a federal statute, it should. This Court has moved a long way from the "legal interest" test of *Tennessee Electric Power Co.* v. *TVA*, 306 U. S. 118 (1939). This movement is clearly in the direction of establishing "injury in fact, economic or otherwise," as the sole criterion of standing. The dissenting and concurring opinion of Mr. Justice Brennan in *Data Processing Service* v. *Camp*, 397 U. S. 150 (1970) and *Barlow* v. *Collins*, 397 U. S. 159, 167 (1970), joined in by Mr. Justice White, shows that at least two members of this Court have adopted that position already. Two lower court opinions written by Judge Berger before his appointment as Chief Justice Berger indicate that he may share their views. See *Gonzales* v. *Freeman*, 334 F. 2d 570, 575 (D. C. Cir. 1964) and *Office of Communication of the United Church of Christ* v. *FCC*, 359 F. 2d 994, 1002 (D. C. Cir. 1966).

The "zone of interest" test espoused by the bank has come under serious criticism from sources outside this Court. Kenneth Culp Davis argues vigorously that this test is analytically faulty, contrary to much existing case law and cumbersome in that it necessarily involves an unwieldly search for legislative intent which may not exist and is generally not clearly expressed. See Davis, *The Liberalized Law of Standing*, 37 U. Chi. L. Rev. 450 (1970). These sentiments have been echoed in numerous federal appellate court opinions including those by Judge Tamm in *Scanwell Laboratories* v. *Shaffer*, 424 F. 2d 859 (D. C. Cir. 1970), and Judge Leventhall in *Air Reduction Co.* v. *Hickel*, 420 F. 2d 592, 594 (D. C. Cir. 1969), both discussed by Professor Davis.

It is Mrs. Russell's position that the "injury in fact" test is the proper standard for determining the standing of a litigant to raise a question of violation of a federal statute. Mrs. Russell comes squarely within the parameters of this test.

III.

CHALLENGE TO AGENCY ACTION IS NOT A PREREQUISITE FOR STANDING WHERE NO APPROPRIATE AGENCY HAS ACTED.

The bank argues that private litigants have no standing to allege violations of the National Banking Act without specific remedial legislation. *Investment Company Institute* v. *Camp* and *Data Processing Service Organizations* v. *Camp*, as well as *Arnold Tours, Inc.* v. *Camp*, 400 U. S. 45 (1970) are signposts which mark a clear trend in the opposite direction of recognizing a private right of action where the Comptroller of Currency, charged with enforcing the National Banking Act, does so improperly. The bank tries to distinguish these cases by pointing out that Mrs. Russell is not challenging an illegal action of the Comptroller. What the bank does not point out is that no ruling on the legality of its fund was ever sought

or given, and that consequently the Comptroller did nothing for Mrs. Russell to challenge. Nor does the bank point out that no machinery exists whereby Mrs. Russell could initiate the Comptroller's examination and ruling. 12 C. F. R. 1.9 (1971) provides that "any *bank* may request the Comptroller of Currency to rule on the application of this part, or Par. 7 of 12 U. S. C. 24 . . ." [containing § 16 of the Glass-Steagall Act]. The individual fund customer or depositor in the bank can rely on no corresponding provision.

This Court has recognized that where no administrative remedy to agency action is afforded, it is draconian to insist on "exhaustion of remedies" as a prerequisite to judicial review of that action. *Rosado* v. *Wyman*, 397 U. S. 397 (1970). The present case is clearly parallel: the bank would deny Mrs. Russell's standing because she failed to challenge a non-existent ruling which could only be initiated by the bank. It makes no jurisdictional sense to allow the bank to distinguish *Investment Company Institute* v. *Camp* and the other cases cited above because of its own failure to obtain a ruling from the Comptroller on the propriety of its fund.

Professor Davis suggests and Mrs. Russell agrees that the law of standing in the federal courts has become a clumsy and unnecessarily arcane catchall of fine distinctions drawn with no regard to real differences, too often used to eliminate lawsuits which ought to be eliminated for other reasons, such as ripeness, mismanagement or because they involve political questions. See Davis, *The Liberalized Law of Standing*, 37 U. Chi. L. Rev. 469-470. Professor Davis summarizes his argument as a rhetorical but very relevant question:

> The natural system is that of the common law: If A and B are private parties and A hurts B, B has standing to get a determination of the legality of A's action. Why should not the law be the same, whether A is the government, an agency, an officer, or a private party, and whether the injury is to B's person, his physical property, or his intangible interests? Is not the natural system the simple

one that injury in fact is enough for standing? 37 U. Chi. L. Rev. 468.

IV.

THE COMPLAINT ALLEGES SUFFICIENT FACTS TO ESTABLISH THAT THE BANK'S FUND IS IN VIOLATION OF THE GLASS-STEAGALL ACT.

The merits of this case are not properly before the Court since the trial court ruled only on the issue of standing, and this alone was the narrow issue decided by the court of appeals below. (Petition A4.) Nevertheless, the bank attempts to distinguish its fund from the open-end investment account condemned in *Investment Company Institute* v. *Camp* on the basis of its relationship with Merrill Lynch, Pierce, Fenner & Smith. The bank points out that a customer contract (Petition A20) requires each fund customer to maintain at Merrill Lynch a separate account holding the securities purchased for him or her. When the customer elects to withdraw from the fund, he may keep securities in his Merrill Lynch account as an alternative to a cash payout. Because of this separation of accounts and the option to terminate in kind as well as in cash, the bank maintains there is no comingling of customer funds. The bank admits that a single investment decision might affect all customer accounts, but argues that this is a normal incident of any investment program which serves more than one customer.

The bank's argument completely ignores the uniformity of purpose and function arising from the program's commitment to a standardized portfolio for each investor. This commitment led to regimentation. The bank administered all customer accounts in exactly the same way in accordance with a preconceived investment policy. Every account was subordinated to the "standard portfolio . . . without consideration . . . of federal tax or other individual circumstances of investors." (Petition A20-21). This standardization was achieved to a point of "substantially identical lists of stock in substantially

identical proportions" for all fund customers (Appendix below 40). The significance of separate customer accounts fades where all accounts are administered in the same way, and where each account receives the same securities as all others in proportion to its contribution. Under such circumstances all accounts are the equivalent of one common fund under the direction and control of the bank as common administrator. This is certainly the effect of commingling, if not the traditional form.

The bank urges in its brief (p. 3) that since May 12, 1970, they no longer administer the fund on a completely discretionary basis. This merely diverts attention from the issue. If the bank collected $7,500,000.00 in violation of the Glass-Steagall Act in the first instance, nothing that they could do subsequently by their unilateral action could validate the illegality.

This substantial identity of investments in proportion to contributions, which so characterize the bank's fund, undermines the argument that the fund was somehow different because the customer could elect to receive securities on termination rather than a prorata share of the common fund in cash. Since the substantial identity pervades all fund accounts, the securities held in any given account *are* its owner's prorata share of the whole at any given time. To illustrate, suppose five men contribute $100.00 in equal shares to buy 100 shares of stock from issue "A" and another $100.00 to buy 1 share of stock from issue "B". If one contributor withdraws 20 shares from issue "A" he has received his pro-rata share as much as if he were paid $20.00 for his 20% interest in issue "B". The *form* in which the customer's proportionate interest is redeemable is not significant; what is important is that the customer has the right to demand his pro-rata share at any given time. Free redeemability is the hallmark of a mutual fund, not free redeemability *in cash*, and free redeemability is specifically afforded by paragraph 18 of the fund customer from contract (Petition A23).

Finally, because of its almost symbiotic relationship with the bank Merrill Lynch was not an independent broker acting in the interest of customers who merely receive the advisory services of the bank. In the first place, the contract signed by each fund subscriber took from him any semblance of control over "his broker" short of termination. Paragraph 8 provides that the bank "will have the sole power to instruct Merrill Lynch concerning the investment of my account, and I will not instruct them regarding such investment." (Petition A21.) Second, Merrill Lynch had a special interest in doing only and exactly what the bank ordered. Paragraph 7 of the contract requires the fund customer to pay Merrill Lynch for each transaction dictated by the bank at the "standard rate," and the bank used Merrill Lynch for at least 99% of all fund transactions (Appendix below 41). The bank has not revealed the net sum paid annually to Merrill Lynch from fund transactions carried on through it; however, the bank has admitted that the total fund contributions exceed $7,500,000.00, and it is safe to hazard that the commissions on this sum are substantial. This community of interest between the bank and Merrill Lynch is not unique to the bank's fund, but grows out of a well established pre-existing business relationship. The bank disclosed that Merrill Lynch is a depositor, a borrowing customer and that Merrill Lynch acts as the bank's broker, dealer or underwriter in bank transactions involving various kinds of securities (Appendix below 42).

Given the almost total autonomy afforded the bank by its customer contract, together with the substituting business relationship and community of interest between the bank and Merrill Lynch, Mrs. Russell questions whether the participation of Merrill Lynch in the program is not a distinction without a difference. *Investment Company Institute* v. *Camp* recognized inherent conflicts between the interests of the investment security banker with something to sell and those of a customer seeking impartial investment advice from his commercial banker. At 401 U. S. 633 this Court stated that "the banker who

has nothing to sell his depositors is much better qualified to advise disinterestedly and to regard diligently the safety of depositors. . . ." But does the "banker who has nothing to sell" mean the banker who directs the sale but carries it out through a *factotum?* Is the conflict between the promotional interest of the investment banker and the obligations of the commercial banker avoided by the investment banker's acting through a broker who has no function in the decision making and no stake in protecting the interest of the customer? Clearly the answer is no.

Assuming that Mrs. Russell can prove the allegations of her complaint, as one must for the purpose of a motion to dismiss, it must be concluded that the bank has set up an open-end investment fund of the sort prescribed by *Investment Company Institute* v. *Camp,* and that through the agency of Merrill Lynch the bank seeks indirectly to carry on investment security banking in violation of the clear congressional purpose embodied in the Glass-Steagall Act.

V.

THE COMPLAINT ALLEGES AN AMOUNT IN CONTROVERSY EXCEEDING THE JURISDICTIONAL MINIMUM.

Paragraph 7 of the complaint alleges that Mrs. Russell contributed $20,000.00 to the bank's fund (Petition A11), Paragraph 14 alleges that the fund is illegal (Petition A13) and the complaint prays as damages the return of all customer contributions to the fund including Mrs. Russell's. See paragraph 8 and prayer of the complaint (Petition A11 and A15). Even considering Mrs. Russell's claim alone, without aggregating those of other class members', the complaint clearly sets forth that an amount in excess of the jurisdictional minimum is being illegally held by the bank. Against this, the bank must show "from the face of the pleadings, . . . to a legal certainty, that the plaintiff cannot recover the amount claimed." *St. Paul Indemnity Co.* v. *Red Cab Co.,* 303 U. S. 283, 289 (1937).

After having specifically pointed out that "no issue as to mis-management" of funds is presented (Brief in Opposition 5), the bank specifically resurrects that issue by arguing that the real amount in controversy is the $5,400.00 which Mrs. Russell lost as a result of ill-favored fund investments. If at this stage there is no "issue as to mis-management," then there is no purpose in discussing the amount lost by mismanagement except to provide the bank with a red herring to distract the Court from the real gravaman of the complaint, namely, the return of monies, including Mrs. Russell's $20,000.00, solicited and invested by the bank in violation of the Glass-Steagall Act. To the extent that the mismanagement losses are relevant at all, they are relevant only to show that the danger of speculative investment arising from the combination of investment and commercial banking functions prohibited by the Glass-Steagall Act are real dangers which can still cause serious harm to customers and to the reputations of national banking associations. It was for this purpose only that they were mentioned in the complaint.

It should be noted in conclusion that although the issue was raised below, the trial court and the appellate court declined to dismiss the complaint for insufficiency of jurisdictional amount. Mrs. Russell suggests that if the lack of jurisdictional amount was so "clear" as the bank says, somebody in the courts below would have seen it.

CONCLUSION.

On the strength of these arguments and the arguments set forth in the Petition the Court should grant a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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